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Supreme Court of the United States

October Term, 1969

No. 887

Salvadore Joseph Ferino,
Petitioner

versus

United States of America
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

C. R. Bolton
City Hall Building
Tupelo, Miss. 38801
Attorney for Petitioner

Of Counsel:
D. W. Houston, Jr. and
Claude A. Chamberlin,
Houston and Chamberlin,
Attorneys
101½ East Commerce Street
Aberdeen, Miss. 39730

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No.

SALVADORE JOSEPH FERINO

Petitioner

versus

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on September 17, 1969, Cause No. 26460 of said Court, which cause is entitled United

States of America , Plaintiff-Appellee, versus Leslie Edward Williams, Joseph Anthony Butera and Salvadore Joseph Ferino, Defendants-Appellants, and wherein judgment became final as to this Petitioner, Salvador Joseph Ferino, by order denying his petition for rehearing which order was entered on October 28, 1969.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in this cause has yet been reported. A certified copy thereof will be found set forth in extenso in the Appendix as Appendix A.

JURISDICTION.

The judgment sought to be reviewed herein is dated September 17, 1969, and was entered on September 17, 1969.

This Petitioner's Petition For Rehearing was denied by order of the Court dated October 28, 1969, and entered on October 28, 1969.

This Petitioner verily believes that jurisdiction is conferred on this Court to review the aforesaid judgment by Title 28 of the United States Code Annotated, Part V, Rule 19, Subsection 1 (b), and the jurisdiction of this Court is invoked thereunder.

QUESTIONS PRESENTED FOR REVIEW.

The first question here presented for review is whether or not the rights of Petitioner under the Fourth Amendment To The Constitution of the United States were violated in his arrest and the subsequent search and seizure of his automobile and introduction of evidence obtained therefrom; and the

second question presented for review is whether the United States may use evidence in a prosecution under the laws of the United States which evidence was illegally obtained by an officer of the State of Mississippi in a manner which was in violation of and contrary to the Constitution and laws of the State of Mississippi.

The circumstances under which the arrest and subsequent search took place were that certain state officers were maintaining a roadblock on the highway in the Town of Mantachie, Mississippi to investigate reports that youngsters had been shooting cherry bombs in the vicinity. While these officers were stopping cars at the roadblock to investigate the occupants concerning the shooting of these fireworks, one of the

officers saw this Petitioner walking across the road 200 or 300 feet away toward an automobile on the opposite side of the road and immediately began going toward the Petitioner for the purpose of determining who he was, according to the officer's testimony. As the officer was walking toward the Petitioner, the Petitioner entered his automobile and began backing it onto the highway at which time the officer called for him to halt and when the officer got no response he pulled his pistol and called again for him to halt, which the Petitioner did. The officer then asked him to produce his driver's license which he failed to do, whereupon the officer pleaced him under arrest for failure to have a driver's license. Approximately ten or fifteen

minutes later this officer searched the Petitioner's automobile without a search warrant and found therein two billfolds which contained the names of Joseph Anthony Butera and Leslie Edward Williams, who are the other Defendants in this case. Subsequently, it was discovered that the Bank of Mantachie had been burglarized and a manhunt was begun which resulted a few hours later in the arrest of Butera and Williams some several miles from the town of Mantachie. Butera and Williams were searched at the time of their arrest and the search revealed three five dollar bills, the torn edges of which were shown by the Government to match fragments of bills found in the bank that morning. The billfolds containing the names of Butera and Williams found in Petitioner's

automobile was the only evidence which in any way connected the Petitioner with the burglary of the bank or with the other Defendants who had been caught with very incriminating evidence upon their persons, except one microscopic particle of material later found in Petitioner's trousers by chemical examination which was of the same type as the bank vault insulation material. This minute particle was a material composed of Portland cement and vermiculite mica which the Government's own expert witness admitted was not found only in bank vaults but was used in the construction of various buildings.

At the time the officer began his pursuit and arrest of the Petitioner, the Petitioner had committed no misdemeanor in the officer's presence, the

officer had no warrant for his arrest, and the officer did not know of the commission of any felony. Under the law of the State of Mississippi, an arrest without a warrant can be made only for an indictable offense committed, or a breach of the peace threatened or attempted in the arrestor's presence; or when a person has committed a felony, though not in his presence; or when a felony has been committed, and he has reasonable ground to suspect and believe the person proposed to be arrested to have committed it; or on a charge, made upon reasonable cause, of the commission of a felony by the party proposed to be arrested, as provided by Section 2470 of the Mississippi Code of 1942, Annotated.

Section 2470 of the Mississippi

Code of 1942, Annotated is found at Page 122 of the 1968 Cumulative Supplement to Volume 2A of said Code and is as follows:

> An officer or private person may arrest any person without warrant, for an indictable offense commited, or a breach of the peace threatened or attempted in his presence; or when a person has committed a felony, though not in his presence; or when a felony has been committed, and he has reasonable ground to suspect and believe the person proposed to be arrested to have committed it; or on a charge, made upon reasonable cause, of the commission of a felony by the party proposed to be arrested. And in all cases of arrests without warrant, the person making such arrest must inform the accused of the object and cause of the arrest, except when he is in actual commission of the offense, or is arrested on pursuit.
>
> Any law enforcement officer may arrest any person on a misdemeanor charge without having a warrant in his possession when a warrant is in fact outstanding for that person's arrest and the officer has knowledge through offical channels that the warrant is outstanding for that person's arrest. In all such cases, the

> officer making the arrest must inform such person at the time of the arrest the object and cause therefor. If the person arrested so requests, the warrant shall be shown to him as soon as practicable.

Section 8108 of the Mississippi Code of 1942 Annotated at Page 405 of Volume 6 of said Code provides that certain specified officers may demand the production of driver's licenses and said Code Section is as follows:

> Every licensee shall have his operator's license in his immediate possession at all times when operating a motor vehicle and shall display the same, upon demand of a justice of the peace, a peace officer or a field deputy or inspector of the Commissioner. However, no person charged with violating this section shall be convicted if he produces in court an operator's license theretofore issued to him and valid at the time of his arrest.

The Supreme Court of Mississippi has interpreted Section 8108 of the Mississippi Code in the case of Morgan

v. Town of Heidelberg, 150 So. 2d 512, 246 Miss. 481, wherein it was held that this statute was constitutional for the reason that it confines the right to demand exhibition of a drivers license to specified officers and that by necessary implication it empowered them to stop a car and require exhibition of the license but further stated that this right of the officers must be exercised in good faith for the purpose of determining whether the operator has a drivers license. In its opinion, the State Supreme Court emphasized that the right to demand exhibition of a license was an unusual and far reaching right and was justified only when done by specific officers and then only when a good faith check of the drivers license was being made in the exercise of the

police power of the state to prevent unqualified and unfit drivers from endangering other persons using the highways.

STATEMENT OF THE CASE.

The evidence presented by the Government showed that it was discovered during the early hours of July 30, 1967, that the Bank of Mantachie had been burglarized, and that prior to the discovery of the burglary the Petitioner Ferino had been arrested for failure to produce a drivers license on the demand of a person who was employed by the sheriff of Itawamba County on a part time basis and who was then conducting a roadblock for the purpose of stopping youngsters who had been reported to be shooting fireworks. (A-365,366) Approximately ten or fifteen minutes after Ferino was arrested his vehicle was searched without

search warrant and the search revealed two billfolds which contained the names of the other Defendants in this case, Butera and Williams. (A-367,368,460,461) That subsequently it was discovered that the bank had been burglarized and the other Defendants, Butera and Williams, were found and arrested together at approximately 8:45 A. M. on that morning several miles from the Town of Mantachie at which time a search of Butera's person revealed three five dollar bills (A-544), the torn edges of which were shown by the Government to match fragments of bills found in the bank that morning. (A-635) After the arrest of these two defendants they were placed in the same room with the Defendant Ferino (A-605) and at approximately noon of that day the clothing of all three Defendants was

removed and subsequently sent to the Federal Bureau of Investigation Laboratory for examination. (A-602) The Government introduced evidence that a microscopic particle of material composed of Portland cement and vermiculite mica was found on the trousers of Ferino which was shown to be the same type material used as insulation in the bank vault which was burglarized. (A-645)

The only evidence which in any way connected the Defendant Ferino with the burglary of the bank or with the other Defendants, Butera and Williams, was the discovery in Ferino's automobile of the two billfolds containing the names of Butera and Williams and the finds of the microscopic particle of material in his trousers which was of the same type as the bank vault insulation material. (A-645), and it was admitted by the Government's

own expert witness that the use of this material was not restricted to bank valuts but was used in the construction ofvarious buildings. (A-650,651,663)

At the time Ferino was arrested for failure to produce a drivers license the proof showed that the person who arrested him had no knowledge of the burglary of the subject bank. (A-369) The proof further showed that the person making said arrest was not conducting a road block for the purpose of examining drivers licenses (A-372) and that at the time he saw Ferino and began going toward him to investigate him, Ferino was crossing the road on foot going toward and entering his parked car 200 to 300 feet from where the officer then was (A-365,366,367,372), and the proof also showed that Ferino had committed no misdemeanor in this

arresting officer's presence when the officer began going toward him or when the officer commanded him to halt (A-372) but that the officer's sole purpose in advancing upon Ferino was to determine who he was. (A-372)

In the case at bar the state officer was not conducting a road block for the purpose of examining drivers licenses but was conducting same for the purpose of stopping cars and investigating the cars and occupants in connection with a report he had received that youngsters were shooting cherry bombs. In the absence of having seen anyone commit the misdemeanor of disturbing the peace by shooting cherry bombs, this officer had no legal right to stop and investigate anyone for this purpose and therefore he was conducting a roadblock in violation of the constitutional rights.

of all persons using that road rather than conducting a roadblock for the purpose of examining drivers licenses at the time he saw Ferino cross the road two or three hundred feet from him and begin to enter his car. The officer testified that he had no knowledge of the burglary of the bank at the time he began his pursuit of Ferino or at the time of the arrest and that Ferino was committing no crime in his presence at the time he began his pursuit, nor at the time he called for Ferino to stop, nor at the time he pulled his pistol, nor at any time. The officer testified that his sole purpose in going after Ferino was to determine who he was, and it is also to be noted that Ferino was not even operating his vehicle when the pursuit was begun. Certainly, under these cir-

cumstances, this could not constitute a good faith inspection of a driver's license for the purpose of protecting the other users of the highway. Further, it is submitted that no officer or person has the right under the law of Mississippi to pursue and stop any person to determine who they are in the absence of any probable cause that a felony has been committed. In this case when the officer began his pursuit Ferino was merely walking across a public road and entering his car, at a time when it was not known that any felony had been committed and when no crime had been committed in the officer's presence.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

It is the contention of this Petitioner that his arrest and the subse-

quent search of his vehicle were unlawful under the Constitution and laws of the State of Mississippi for the reason that under the circumstances the officer had no right to pursue Petitioner to demand that he produce a driver's license and also for the reason that the officer had already begun his pursuit and arrest at a time when he had no probable cause. The officer testified that he first saw Ferino began to enter his parked car the officer decided to determine who he was and proceeded down the road toward him. (A-372) As Ferino began to back his car out the officer testified that he, the officer started hurrying and called for Ferino to stop and when he did not stop the officer pulled his pistol out and called again for him to

stop, which Ferino did. (A-366,375) The officer then demanded the exhibition of Ferino's drivers license and upon Ferino being unable to produce same placed him under arrest for failure to have a drivers license. (A-366) The officer further testified that he had no knowledge at that time of the burglary of the bank and that Ferino was committing no crime in his presence at the time he began going toward him for the express purpose of seeing who he was, nor had he committed any crime in his presence at the time he called for him to stop and drew his pistol. It is to be noted that the officer was not then conducting a road block to check drivers licenses and did not begin pursuing Ferino for the purpose of determining whether he was a licensed operator of a motor vehicle,

but did so solely for the purpose of determining his identity.

The Supreme Court of Mississippi has passed directly on this point in the case of Smith v. State, 128 So. 2d 857, 240 Miss. 738, wherein that Court held that an officer had no duty nor right to arrest the Defendant where there was no evidence that the Defendant was committing a crime or was attempting to breach the peace when the officer began his pursuit and that therefore the search made of the Defendant's automobile was an incident to an illegal arrest and was an unlawful search. The facts of the Smith case are very analogous to those of the case at bar, the facts in that case being that the sheriff met an automobile going at a slow rate of speed and after

passing this car the sheriff came up behind it. The driver of the car motioned for the sheriff to come up beside his car, which the sheriff did and then rolled his window down, whereupon the driver of the car saw the sheriff and drove away rapidly. The sheriff sounded his siren and immediately pursued the car and after he had pursued him for ten seconds the sheriff noticed that the car was exceeding the speed limit. The sheriff followed the car through traffic as the car ran three red lights and traveled at an unreasonable rate of speed on the crowded street. After making the arrest the car was searched without a search warrant but as an incident of the arrest, and burglar tools were found therein and the Defendant was thereafter convicted of having in his possession burglary tools.

The Mississippi Court held however that the search begins when the pursuit begins and that unless probable cause for arrest existed before the pursuit began, the arrest and the subsequent search as an incident to the arrest are both unlawful.

The evidence that the officer had begun his pursuit of Ferino in the case at bar prior to having any probable cause is stronger than in the above cited case, the officer having stated that he drew his pistol after he called for him to halt the first time. The offenses for which the Defendant in the Smith case and Ferino were arrested were both for traffic violations which were committed after pursuit had begun, or at the least came to the attention of the officer after pursuit had begun.

It does not seem reasonable that if an arrest cannot be made for speeding and running traffic lights in the presence of an officer because he began his pursuit without probable cause, that an arrest can be made for failure to exhibit a drivers license when the officer had begun his pursuit for another purpose entirely and at a time when the officer is not engaged in the act of inspecting drivers licenses at all, let alone for the purpose for which the law authorizes such an inspection.

The testimony of Patrolman Charles D. Holcomb that the names of the Defendants Butera and Williams were found in the billfolds found in Ferino's car (A-460,461) was the only evidence connecting the Defendant Ferino with the Defendants Butera and Williams, who

were arrested together and one of whom did in fact have incriminating evidence on his person, same being the torn bills which were matched with pieces of bills found in the bank.

There is no Mississippi statute authorizing an officer to pursue or stop persons for the purpose of identifying them, and in fact the case of Smith v. State, supra, in effect held that once an officer began pursuit without probable cause he forfeited the right to arrest for a crime which came to his attention after he had begun pursuit.

This Petitioner submits that to allow the introduction in a Federal prosecution of the fruits of an illegal arrest and search made by a state officer in violation of the Constitu-

tion and laws of the state which he serves is in conflict with applicable decisions of this Court.

In the case of Rea v. United States, 350 U.S. 214, 100 L. Ed. 233, 76 S. Ct. 292, this Court held that the policy of the Federal Rules of Criminal Procedure governing searches and seizures is defeated if a federal officer can use the fruits of an unlawful search either in federal or state proceedings. This Petitioner earnestly submits that to allow the United States to use in evidence the fruits of an illegal arrest and detentionby a state officer would no less defeat the Federal Rules of Criminal Procedure.

In its opinion the Court of Appeals for the Fifth Circuit Court cited the recent case of Terry v. Ohio, 392 U.S.

1, 20 f.f. (1968). However, Petitioner respectfully submits that this case is not applicable to the case at bar for in the Terry case the officer had an absolute right under the law of the State of Ohio to accost, stop and investigate persons on suspicion and this Court merely held in that case that this Ohio law was not violative of the Constitution of the United States. As is clearly shown in the Smith case, supra, the State of Mississippi has no law statutory or otherwise, which clothes an officer of the state with any right to accost, stop or investigate any person merely on suspicion. Under the law of Mississippi and the circumstances at that time, Ferino had an absolute right to ignore the officer and drive away even if he did hear him order him to stop, and the officer had no right whatever to draw

his gun and order his halt.

Petitioner would also point out that even if Mississippi's law were the same as that of Ohio, the factual situation was entirely different in the Terry v. Ohio case, supra, for there is a great deal of difference in a person walking across a highway to get in an automobile even at a later hour of the night and in a small community and the situation of three persons making a dozen trips to a store window and carrying on furtive conversations with each other in between trips as in the Terry case. The officer in the Terry case testified that he had worked that beat for thirty years and that because of his long experience and the peculiar actions of these three men his suspicion was aroused. Certainly

there was much greater cause for suspicion there than in the case at bar, but we earnestly submit that the act of an officer under the circumstances in the Terry case would be illegal in Mississippi. The only thing which could conceivably make anything Ferino did suspicious would be the fact that he was in a small community, for surely being abroad at night is not unusual in most areas of this country and it would seem that persons in small communities are entitled to the same rights as their fellow citizens in larger communities and cities in any event.

The right of the officer in the Terry case to search during his investigation was bottomed entirely on the necessity of the officer for protection

of himself and others in the event those whom he was investigating were armed but the Court did not say that had the three suspects merely walked away the officer would then have had a right to stop them at gun point. The stopping of Ferino at gun point when he was proceeding away from the officer could not be interpreted as being for the officer's protection, which would be necessary under the Terry case. We have attempted to point out the factual difference of the case at bar from the Terry case, which we think is considerable; but we emphasize that the real thrust of our argument is that the Supreme Court merely held in Terry v. Ohio that the State of Ohio had not violated the Defendant's rights under the Fourth Amendment of the Constitution of the United States

in allowing such an investigation and search but it did not make it incumbent upon all other states to adopt the law of Ohio, and the State of Mississippi has not only not adopted that law but has held directly contrary to it on every occasion. We earnestly submit that this officer of the State of Mississippi acted illegally and without authority of the State of Mississippi, in arresting the Defendant Ferino, and it would defeat the Rules of Federal Procedure for the United States to be allowed to use the tainted evidence procured by an officer of the State of Mississippi, evidence which the State of Mississippi itself has refused to allow and would be in conflict with the applicable decisions of this Court.

This cause was originated in the

United States District Court for the Northern District of Mississippi Eastern Division, by indictment under Sections 2 and 2113 (a), Title 18, United States Code Annotated.

PRAYER.

Wherefore, your Petitioner prays that a Writ Of Certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals For The Fifth Circuit, commanding said Court to certify and send to this Court a transcript of the record in the case entitled "United States of America, Plaintiff-Appellee versus Leslie Edward Williams, Joseph Anthony Butera, Salvadore Joseph Ferino Defendants-Appellants, No. 26,460" including also the proceedings in said Court of Appeals to the end that said

cause may be reviewed and determined by this Court and the judgment of said Court of Appeals be reversed here.

Respectfully submitted,

C. R. BOLTON,
CITY HALL BUILDING
TUPELO, MISSISSIPPI
ATTORNEY FOR PETITIONER

OF COUNSEL:

D. W. HOUSTON, JR.
CLAUDE A. CHAMBERLIN
HOUSTON & CHAMBERLIN
101½ EAST COMMERCE STREET
ABERDEEN, MISSISSIPPI

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26460

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LESLIE EDWARD WILLIAMS, JOSEPH ANTHONY BUTERA AND SALVADORE JOSEPH FERINO,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Mississippi

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(September 17, 1969)

Before WISDOM and MORGAN, Circuit Judges, and DAVIS,* Judge of the U.S. Court of Claims.

DAVIS, *Judge*: During the night of July 29-30, 1967, the federally-insured Bank of Mississippi at Mantachie, Mississippi, in rural Itawamba County, was broken into, and about $14,000 taken. Appellants were arrested later on July 30th, not at the scene of the crime

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*Sitting by designation.

but elsewhere in Itawamba County. They were indicted and convicted in the Northern District of Mississippi, in a joint jury trial, of aiding and abetting each other to enter the bank with intent to commit larceny, in violation of 18 U.S.C. §§ 2 and 2113 (a). No confession was introduced and no issue is raised as to the sufficiency of the evidence or the instructions. The main questions center on the validity of the arrests and the searches made. We shall discuss the points *seriatim*.

I

The arrest of Ferino and the seizure of articles in his automobile

Ferino was arrested about 3:30 A.M. - 3:45 A.M. on July 30th, near Mantachie. At that time, Deputy Sheriff Hendricks, Deputy Sheriff Buse, and State Patrolman Holcomb, investigating a report that youngsters were exploding fireworks on a householder's property, had set up a roadblock on the highway at which some cars were stopped. While the other two officers were away following a car which had sped from the roadblock, Hendricks noticed an unknown lone individual walking across the highway toward a parked car with Alabama tags. Hendricks started toward this individual and, as the latter began to back the car out, called on him to stop; when the driver continued, Hendricks pulled out his revolver, ran alongside, ordering him to stop, which he did. In answer to queries, the driver (Ferino) said he had no driver's license or identification. Hendricks then formally placed him under arrest and had him remain in the car (since Hendricks, alone, was guarding three cars

and several people) for some time until the other officers returned. Then, Ferino, again on inquiry, was unable to produce a driver's license or car registration. He was asked to step out of the car, and by shining a flashlight into the car the officers saw two billfolds inside; these were retrieved and turned out to have identifications of the other appellants, Williams and Butera. The three ofifcers at the roadblock did not know, during this time, that the bank had been burglarized.

Ferino's warrantless arrest is challenged on the basis that Deputy Sheriff Hendricks had no authority, and also for lack of probable cause. Hendricks was never formally appointed in writing (as Mississippi law required), but he had been employed by the sheriff, had signed an oath of office, and had acted for a long time as a deputy in uniform, without challenge. Under Mississippi law he was at least a *de facto* peace officer (Mississippi Code, 1942 Ann., Sec. 4045; *Miller v. Batson*, 160 Miss. 642, 134 So. 567 (1931)) and had the right to arrest for motor vehicle violations and to demand driver's licenses (Mississippi Code, 1942 Ann., Sec. 8108).

The prosecution treats Ferino as having been arrested by Hendricks after the former had been unable to produce a license or identification. An arrest at that time certainly had a basis of probable cause that he was driving without proper credentials.[1] Moreover,

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[1]Hendricks testified that Ferino told him that some lady had brought him from Tupelo to Mantachie and that he had gotten

it is most probable that Hendricks, as he testified, did not start to move toward Ferino with the purpose of arresting him, but simply to have him identify himself in connection with the fireworks-exploding which had been going on — a reasonable request at that time of night and in those circumstances. Accordingly, it cannot be said that the arrest "began" when Hendricks first moved toward Ferino (and before it was known that the latter could not identify himself). See *Smith v. State,* 128 So. 2d 857 (Miss., 1961).

It would seem, however, that the detention first occurred when Hendricks drew his revolver, which was after Hendricks approached Ferino but before the latter was asked to produce license or identification. We believe that this stoppage-by-revolver was, in the circumstances, a reasonable "seizure" to prevent Ferino's escaping by car (*cf. Terry v. Ohio,* 392 U.S. 1, 20 ff. (1968)), a temporary "seizure" which did not have to be justified by "probable cause" to believe that a particular crime had been committed. *Cf. Allen* v. *United States,* 390 F. 2d 476, 479 (C.A.D.C., 1968). As indicated above, it was prudent and reasonable for Hendricks to seek identification from the unknown person on that rural highway at the time, and when this individual failed to stop in response to two calls, but instead began to drive away, Hendricks had no choice but either to let the man go or to exert the

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out of her car to walk to his own. Hendricks had, however, seen no car approaching in that area; in addition, Ferino was a stranger to Hendricks who was a long-time resident of the county.

force of a display of his firearm.[2] Disorder had been reported in the neighborhood; a roadblock had been established to help investigation of this disorder; it was the dead of night; the scene was a rural highway near a small Mississippi town; the car the unknown man was driving away had out-of-state tags; it was possible that this person was connected with the disorder but he had refused to heed two calls to halt — giving rise to reasonable suspicion that something was amiss; as a *de facto* deputy sheriff, Hendricks had the right to inspect drivers' licenses and demand identification. In these circumstances, the officer could validly decide to detain the driver momentarily, for identification purposes, rather than to let him drive away. That was a reasonable police practice for that time, that place, and those circumstances. By the same token, the conditions were such that the invasion of Ferino's privacy and the disruption of his legitimate activity was very minor.

The initial detention being lawful, it was then lawful for Hendricks to inquire as to the driver's license and identification. On the latter's failure to respond adequately, there was, as we have said, probable cause to arrest for unauthorized driving. The arrest was valid.

As for Butera's and Williams's billfolds, they were seen from without the car by use of a flashlight, after Ferino's arrest. Being in open view from the outside,

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[2]Since Hendricks was the only officer at the roadblock at that moment, he could not well give chase.

they could be validly taken without a warrant. *Harris v. United States*, 390 U.S. 234, 236, 88 Sup. Ct. 992, 993, 19 L. Ed.2d 1067, 1069-1070 (1968). Since Ferino had twice said that he had no identification or license, a billfold — in which one ordinarily keeps both identification and a driver's permit — would obviously be significant. Moreover, under Mississippi law an officer can search a car after the lawful arrest of the driver for a traffic violation (*Watts v. State*, 196 So.2d 79 (Miss. 1967)), and *Warden v. Hayden*, 387 U.S. 294, 87A Sup. Ct. 1642, 18 L. Ed.2d 782 (1967), allows seizure of evidential material as well as the fruits or instrumentalities of a crime.

II

The arrest of Butera and Williams

After Ferino's arrest, it was discovered in the early morning of July 30th that the bank had been entered. Coming from nearby Fulton to help in the investigation, Patrolman Knight (of that police department) met two strangers walking on the highway away from Mantachie, wet up to their knees. On inquiry, they said they had spent the night at the sister of one of them in Mantachie (but gave no names) and that they were going home (without naming a place); they asked the name of the next town and U.S. highway. Knight offered them a ride to Fulton (after first going to Mantachie); they preferred to be picked up on his way back to Fulton. In Mantachie, Knight reported the encounter to State Patrolman Holcomb and an FBI agent. These three returned to the highway where Knight had seen the two and saw them further down the road reaching for the handle of the door of a car parked

in front of a house. On the officer's approach, the two men ran into the woods, leaving the car door open. Holcomb broadcast a description of the men over his car radio, and later that day Butera and Williams, answering that description, were arrested by other officers, without a warrant, in a remote area of the county, not too far from the woods the two men had earlier entered.

A search of Butera at this arrest produced $31 in ones, fives, tens, and twenties. At the trial, three of the fives were traced directly, by expert testimony, to five-dollar bills from the bank's vault, and there was also less direct testimony connecting the other small bills to the bank. A tear gas pen was found on Williams.

Appellants insist that there was no probable cause for the warrantless arrest of Butera and Williams, but we disagree. By the time of this arrest, the facts known to the officers concerned with searching for the two strangers first seen by officer Knight (information which was communicated either directly or impliedly to the officers who actually made the seizure) included: (a) the burglary of the bank, indicating that more than one person was probably involved;[3] (b) the arrest of Ferino, an out-of-stater, and its surrounding circumstances, including the two billfolds with their separate identifications of two out-of-state men other than Ferino; (c) the statements by the two men

[3]For instance, near the bank there were found cetylene torches and other heavy equipment obviously used in the burglary.

to Knight, their appearance when he first met them, and their obviously being complete strangers to the area; (d) the actions of the two men in trying to open a car door and in running into the woods when the officers returned from Mantachie; (e) their descriptions which were broadcast; (f) their being found where they were. This accumulated knowledge satisfied the standard of probable cause to believe that the two arrested men were connected with the burglary. It follows, too, that the search of their persons, at the time of arrest, was proper because they had been validly arrested.

III

The seizure of appellants' clothing

As already stated, Ferino was arrested near Mantachie at about 3:30 A.M. or 3:45 A.M. on July 30th; shortly thereafter, he was taken to the jail in neighboring Fulton. Butera and Williams were arrested at about 9 A.M. the same morning, and also taken to Fulton. There, FBI agents talked to the three men, beginning sometime between 9:30 and 9:45 A.M., advising them of their rights and interrogating them. The appellants were also fingerprinted and "booked" at that time, and their clothing was removed. The record does not reveal precisely when the clothing was taken, but an FBI agent testified that it was during the fingerprinting and "booking" process — "shortly" after appellants reached the jail, "prior to Noon or around Noon".

The FBI agents desired the clothing in order to send it to the FBI laboratory in Washington, and it was so sent (apparently as soon as it could be). As a result of this inquiry and testing by the laboratory, it was shown at the trial by expert testimony that the clothing (Ferino's and Williams') contained traces of an insulation material which was the same as that used in the bank's vault door and that Butera's and Williams' clothing had traces of "slag balls" (typical of a metal-burning or metal-cutting operation) similar to "slag balls" from the safe in the vault. This evidence and the clothing were admitted over objections that the taking of the clothing was illegal.

We hold that the seizure of the clothing was proper as an incident to the arrest of appellants, and that the ensuing search was valid. The men obviously could not be disrobed in public at the places they were first taken into custody — not until they reached the jail at Fulton where other clothing was available for them. Their clothing was removed within a short period after they arrived there, and it is plain that the FBI agents intended from the beginning of their investigation to take the suspects' clothing and have it tested in the laboratory for any tell-tale evidence which might be discovered. This taking-for-testing was not an afterthought, but rather an action which was an integral part of, and therefore incident to, the process of arrest.[4] See *Gollihar v. United States*, 362 F.2d 594,

[4]It was reasonable to deal with the three suspects at one time, on the morning of July 30th, and not to take Ferino's clothing before dawn when he was first brought to Fulton.

599-602 (C.A. 8, 1966); *Hancock v. Nelson*, 363 F.2d 249, 252 (C.A. 1, 1966).

These facts differentiate this case from the Court's recent decision in *Brett v. United States*, 5 Cir., 1969 ___ F.2d ___ [No. 24664, May 5, 1969], in which the search of the clothing, which took place three days after the arrest, was held invalid. The Court pointed out that the clothing had been in routine jail custody for ordinary safekeeping for three days, and that the "search was not incident to an arrest, because it was not even close to contemporaneous" (slip op., p. 8), and the opinion distinguished cases such as *Golliher* and *Hancock, supra,* on the ground that those decisions were "concerned with testing of clothing seized incident to arrest" (slip op., p. 11). The present case, as we have pointed out, is likewise concerned with testing of clothing seized incident to arrest, clothing taken substantially contemporaneously with the arrests and for the very purpose of testing. See *Cassady v. United States*, 410 F.2d 379, 380 (C.A. 5, 1969).

IV

Denial of a speedy trial

Williams claims that he was denied a speedy trial. The dates are these: — his arrest took place on July 30, 1967, the commissioner held him on August 7th, the indictment was returned on January 30, 1968, not guilty pleas were entered on February 7, 1968, and the trial took place in June 1968. On February 15, 1968, at a hearing before Circuit Judge Clayton (sitting by designation in the District Court) the pleas were con-

firmed and the appellants were given thirty days in which to file motions. Williams' counsel said at that time that Williams did not wish any additional time, and asked for a trial. Judge Clayton responded that the case would be set for trial in due course, but not before the expiration of the thirty days "the other two defendants may use, if they care to do so" On March 13, 1968 (not quite thirty days later), Williams moved *pro se* for a speedy trial and for severance, and the Government responded that the motions were improper because he was then represented by court-appointed counsel. The latter did not thereafter ask for a trial until shortly before it was actually held. In addition, there is no showing (or substantial offer to show) that the delay prejudiced Williams in his preparation for trial or in the trial itself, and it is clear that most of the delay was due to the lack of a regular judge in the district.[5] In the particular circumstances, though the delay was long, the constitutional claim of lack of a speedy trial must be rejected. See *Reece v. United States*, 337 F.2d 852 (C.A. 5, 1964).

V

Williams' claims of excessive bail and right to a severance

The commissioner refused to reduce Williams' bail below $25,000, which he was unable to make,[6] but he

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[5]Judge Clayton had been appointed to the Court of Appeals, and Judge Keady did not take office until April 26, 1968. During the period Judge Clayton sat by designation in the District Court (after he had taken his place on this court on November 24, 1967), no trials were held. The first trial was held on May 4, 1968, after Judge Keady assumed his seat.

[6]The other two appellants were released on bail.

never asked relief from the district court or took an appeal to this court, as he should have if he wished to raise the issue. *Stack v. Boyle,* 342 U.S. 1, 6, 72 Sup. Ct. 1, 4, 96 L. Ed. 1, 7 (1951); *Hemphill v. United States,* 392 F.2d 45, 47 (C.A. 8, 1968). In the absence of some valid excuse or justification — and none is given here — it is too late to do so after conviction. There is, furthermore, no showing, or solid offer to prove, that Williams' incarceration significantly impeded his preparation for trial or his consultation with counsel.

Williams also says that the trial court should have granted him a severance. There was, however, no real reason to try Williams separately on this joint aiding-and-abetting indictment. There was no problem of confessions, or other condition making severance appropriate. The question of separate trials was within the District Court's discretion (*Smith v. United States,* 385 F.2d 34, 37-38 (C.A. 5, 1967)), and no abuse is shown.

The judgments are

AFFIRMED

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No. 887

In the Supreme Court of the United States

OCTOBER TERM, 1969

SALVADORE JOSEPH FERINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Mississippi, petitioner and two others were convicted of aiding and abetting one another to enter a federally insured bank with intent to commit larceny (18 U.S.C. 2, 2113(a)). Petitioner was sentenced to seven years' imprisonment. The court of appeals affirmed in a thorough opinion on which we principally rely (Pet. App. 34–45).

Petitioner's sole contention relates to the propriety of his arrest by a State officer and the seizure of two billfolds from the interior of his automobile incidental to that arrest. As recounted in detail in the opinion

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below, the pertinent events took place in the early morning hours near Mantachie, Mississippi, where two deputy sheriffs and a State patrolman had set up a roadblock while investigating a report that youngsters were exploding fireworks on a nearby property. While he was guarding several cars until the other officers returned from pursuing an automobile which had fled from the roadblock, Deputy Hendricks saw petitioner, a stranger in the vicinity, walk across the highway toward a parked car with Alabama license plates. Hendricks testified that he started walking toward petitioner in order to have him identify and explain himself in relation to the fireworks incidents which had occurred. Petitioner got into his car and began to back away. Hendricks called on him to stop and, when he did not, the deputy pulled out his revolver, ran alongside the car, and ordered petitioner to stop. Petitioner did so. The deputy then asked petitioner for his driver's license. Petitioner was unable to produce his license and stated that he did not have any identification with him. He was then arrested. When the officers shined a flashlight into the car they saw two billfolds in plain view, which later were shown to belong to petitioner's co-defendants. These billfolds which, in addition to other evidence, connected petitioner to the robbers, were introduced at trial.

Without disputing the reasonableness of the deputy's actions, petitioner nevertheless contends that the original detention—*i.e.*, the stop at gunpoint—was unlawful. He first argues that the detention was unlawful under Mississippi law and that, even if Missis-

sippi law did not affirmatively prohibit the deputy's actions here, the principles of *Terry* v. *Ohio,* 392 U.S. 1, do not govern this case because Mississippi, unlike Ohio, has not acted to clothe law enforcement officers with explicit authority to make "stops" on less than probable cause to arrest.

Petitioner points to no Mississippi decision which denies law enforcement officers the authority briefly to detain individuals, on suspicion less than probable cause, for the limited purpose of on-the-scene questioning to determine their identity and the reason for their presence.[1] Consequently, as the court below implicitly held, there is no reason to suppose that Mississippi courts would deny the existence of such power (commonly exercised by police forces throughout the country), and thus no occasion to consider the question which would be presented had Mississippi undertaken affirmatively to prohibit the kind of police action involved here. Cf. *United States* v. *Di Re,* 332 U.S. 581; *Ker* v. *California,* 374 U.S. 23, 37–39. In *Terry* v. *Ohio, supra,* the State had not by statute authorized its officers to make "stops" and "frisks". This Court, however, treated the question of the legality of such action, absent a State prohibition, as a question of federal constitutional law under the

[1] Petitioner's reliance (Pet. 11) on *Morgan* v. *Town of Heidelberg,* 246 Miss. 481, 150 So. 2d 512, for the proposition that the State officer here had no authority to ask for petitioner's driver's license is misplaced. On the contrary, that case held that the "mere act of stopping cars and detaining drivers momentarily to ascertain whether they are duly licensed does not constitute an arrest" (246 Miss. 487).

Fourth Amendment, 392 U.S. at 16–22; see also *Elkins* v. *United States,* 364 U.S. 206, 223–224. Accordingly, the court below was amply warranted in concluding that the initial "stop" of petitioner under the circumstances of this case met the test of reasonableness and that the rationale of *Terry* applied to justify the ultimate seizure of the billfolds and their introduction into evidence.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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